

1
2 **UNITED STATES BANKRUPTCY COURT**
3 **EASTERN DISTRICT OF CALIFORNIA**

4 In re:)
5 Hal Edwin Buettner, III, and)
6 Michele Kay Elkins,) Case No. 16-26531-C-13G
7 Debtors.)
8) Adv. Pro. No. 22-02015-C
9 Hal Edwin Buettner, III, and)
10 Michele Kay Elkins,) Consolidated
11 Plaintiffs,)
12 v.) DCN BW-001
13)
14 PHH Mortgage Corporation,)
15 Defendants.)

16 In re:)
17 Kevin Randall Krone,)
18 Debtor.)
19) Case No. 15-21528-A-13C
20 Kevin Randall Krone,)
21 Plaintiff,) Adv. Pro. No. 22-02038-C
22 v.)
23) Consolidated
24 PHH Mortgage Corporation, and)
25 Deutsche Bank National Trust) DCN BW-001
26 Company,)
27 Defendants.)


28 **ORDER AMENDING OPINION**

The Opinion filed by this court on October 11, 2023, is hereby amended to correct nonsubstantive typographic errors.

The sentence on Page 14, lines 14-16, is corrected to read: "PHH's contention in this case that there is no federal statutory or common law lien removal authority necessitates explaining federal lien removal."

A copy of the complete Opinion in corrected form is attached hereto

Dated: October 17, 2023

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United States Bankruptcy Judge

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	
Hal Edwin Buettner, III, and)	
Michele Kay Elkins,)	Case No. 16-26531-C-13G
Debtors.)	
)	Adv. Pro. No. 22-02015-C
Hal Edwin Buettner, III, and)	
Michele Kay Elkins,)	Consolidated
Plaintiffs,)	
v.)	DCN BW-001
)	
PHH Mortgage Corporation,)	
Defendants.)	
In re:)	
Kevin Randall Krone,)	
Debtor.)	
)	Case No. 15-21528-A-13C
Kevin Randall Krone,)	
Plaintiff,)	Adv. Pro. No. 22-02038-C
v.)	
)	Consolidated
PHH Mortgage Corporation, and)	
Deutsche Bank National Trust)	DCN BW-001
Company,)	
Defendants.)	

OPINION

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Wholly unsecured junior mortgages may be "stripped off" and rendered "void" in chapter 13 cases by virtue of 11 U.S.C.

§§ 506(d) and 1322(b) (2) once plan payments are complete. The chapter 13 plan confirmation order determines the rights of the junior mortgagee. The problem is how to implement the "strip off" when unsecured junior mortgagees do not cooperate to clear title.

The issue in these quiet title actions is whether Bankruptcy Courts have the power to order liens removed and to clear title following completion of chapter 13 plan payments that render "void" and "strip off" wholly unsecured mortgage liens pursuant to § 506(d). The answer is yes; Federal Rule of Bankruptcy

1 Procedure 7070, incorporating Federal Rule of Civil Procedure 70,
2 embodies a federal lien removal power, which has been recognized
3 for more than a century, permitting federal courts to remove
4 liens and clear title.

5 The Rule 7070 federal cause of action is a species of in rem
6 judgment enforcement in which the judgment being enforced is the
7 final § 1322(b) order confirming the chapter 13 plan, which order
8 has res judicata effect and renders a lien “void” under § 506(d)
9 upon completion of plan payments.

10 Defendant PHH Mortgage Corporation¹ contends on summary
11 judgment that there is no statutory or common law basis for the
12 federal cause of action and that, in any event, it was mooted
13 when PHH reconveyed during the adversary proceeding. PHH is not
14 correct – there is such a cause of action and belated
15 reconveyances by PHH in response to the filing of the Complaint
16 make the Plaintiffs “prevailing parties” for purposes of their
17 demands for attorneys’ fees under California Civil Code § 1717.

18 There is no genuine issue of material fact that the
19 Plaintiffs are “prevailing parties” on the federal count. The
20 actions qualify as “on the contract” for purposes of California
21 Civil Code § 1717, entitling Plaintiffs to invoke the attorneys’
22 fee provisions in the underlying notes and deeds of trust.

23 As PHH has been fully heard on the federal cause of action
24 and on eligibility for attorneys’ fees and cannot win as a matter
25 of law, summary judgment will be entered for nonmoving parties.

26
27 ¹PHH Mortgage Corporation (“PHH”) is successor by merger to
28 Ocwen Loan Servicing, LLC, which was successor in interest to
Residential Funding Corporation. Buettner Adv. Dkt. #54 at 7;
Krone Adv. Dkt. # 37 at 7. Party names are restated as PHH.

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This determination under federal law renders it unnecessary to rule on state-law issues (Civil Code § 2941 and breach of contract), even though they lead to similar results under California law, but not necessarily under law of other states.

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1 Summary Judgment Facts

2 These junior mortgages dating from 2006 are relics of the
3 housing mortgage bubble that collapsed into the Great Recession.
4 The easy money financing scheme that inflated the bubble was to
5 issue a first mortgage that arguably met underwriting standards
6 on a sketchy appraisal and a second mortgage for an additional
7 inflated purchase price, all on the fantasy that eternally rising
8 real estate values assured eventual payment in full.

9 These second mortgages are completely underwater.

10
11 Plaintiff Krone

12 Plaintiff Krone executed a "Secondary Lien Note" for
13 \$61,740.00 and a "Secondary Lien Deed of Trust" on February 1,
14 2006, on real property in Yuba City, California.

15 Krone filed a chapter 13 case on February 27, 2015. Pursuant
16 to § 506(a), the PHH secured claim on the secondary deed of trust
17 was valued by court order at \$0.00, leaving an allowed unsecured
18 claim. The chapter 13 plan was confirmed and performed. Notice of
19 Completed Plan Payments was docketed September 11, 2020. The
20 Trustee's Final Report and Account filed December 11, 2020,
21 reported PHH was paid \$41,365.80 on its allowed unsecured claim.

22 Krone's counsel thrice informed PHH of its duty to reconvey
23 the secondary deed of trust: December 12, 2020; February 6, 2021;
24 and May 30, 2021. Stonewall.

25 Krone filed his adversary proceeding on June 22, 2022, after
26 more than nineteen months of PHH inaction.

27 PHH recorded a Full Reconveyance of the Secondary Deed of
28 Trust on August 22, 2022, 710 days after the lien became void

1 upon completion of plan payments.

2
3 Plaintiffs Buettner and Elkins

4 Plaintiffs Buettner and Elkins executed a Note and Security
5 Agreement for \$110,685.00 and a Deed of Trust on a "California
6 Second Mortgage" form on January 24, 2006, regarding real
7 property in Rancho Cordova, California.

8 Buettner and Elkins filed a chapter 13 case on September 30,
9 2016. The order valuing the PHH secured claim at \$0.00 left PHH
10 with an allowed unsecured claim. The chapter 13 plan was
11 confirmed and performed. Notice of Completed Plan Payments was
12 docketed on September 24, 2021. The Trustee's Final Report and
13 Account filed December 11, 2020, reported \$58,646.62 was paid on
14 unsecured claims totaling \$67,216.98.

15 On January 25, 2022, their counsel communicated to PHH its
16 duty to reconvey the secondary deed of trust.

17 With no response from PHH, this adversary proceeding was
18 filed March 4, 2022. A full reconveyance of the secondary deed of
19 trust was recorded on March 23, 2022, 180 days after the lien
20 became void upon completion of plan payments.

21
22 Analysis

23 I

24 Federal Cause of Action

25 When a lien on property in the jurisdiction of the District
26 Court (including its Bankruptcy Court "unit") is not timely
27 removed, the federal court has a tool at hand.

28 The federal court's power to enforce any lien upon or claim

1 to, or to remove any incumbrance or lien or cloud upon the title
2 to, real or personal property within the jurisdiction of the
3 court is a species of judgment enforcement.

4 The substantive judgment being enforced is the order
5 confirming the chapter 13 plan under § 1322(b)(2) that values the
6 lien at \$0.00, the consequence of which is that the lien is
7 "void" by virtue of § 506(d) contingent only upon completion of
8 plan payments.

9 The recognition of the power to remove encumbrances dates
10 back at least to 1911 when Congress vested the lien removal power
11 in the District Court.²

12 The lien removal power survived the merger of law and equity
13 in 1938, and is now found at 28 U.S.C. § 1655,³ in tandem with
14 Federal Rule of Civil Procedure 70 and Federal Rule of Bankruptcy
15 Procedure 7070.

16 The substantive judgment enforcement aspects of the lien
17 removal power itself are now in Civil Rule 70, as expanded by

18
19 ²Congress specified in 1911 that:

20 When in any suit commenced in any district court of the
21 United States to enforce any legal or equitable lien upon or
22 claim to or to remove any incumbrance or lien or cloud upon
23 title to real or personal property within the district where
24 such suit is brought, one or more of the defendants therein
25 shall not be an inhabitant of or found within the said
district, or shall not voluntarily appear thereto, it shall
be lawful for the court to make an order directing such
absent defendant or defendants to appear, plead, answer, or
demur by a day certain ...

26 Act of Mar. 3, 1911, ch. 231, § 57, 36 Stat. 1102.

27 ³28 U.S.C. 1655 was enacted by Act of June 25, 1948, ch.
28 646, 62 Stat. 944. The Historical and Revision Notes explain:
Based on title 28, U.S.C., 1940 ed., § 118, Act of Mar. 3, 1911,
ch. 231, § 57, 36 Stat. 1102.

1 Bankruptcy Rule 7070, which descends from former Equity Rules.⁴

2 If a party does not comply with a judgment requiring
3 conveyance of land, delivery of a deed or other document, or
4 performance of some other specific act, then the court may
5 appoint someone to do so at the disobedient party's expense. The
6 disobedient party may be held in contempt. Finally, the court may
7 enter a judgment divesting title and vesting it in others. Fed.
8 R. Civ. P. 70, incorporated by Fed. R. Bankr. P. 7070.⁵

9
10 ⁴The Advisory Committee Note to 1937 adoption of Rule 70:

11 Compare Equity Rules 7 (Process, Mesne and Final), 8
12 (Enforcement of Final Decrees), and 9 (Writ of Assistance).
13 To avoid possible confusion, both old and new denominations
14 for attachment (sequestration) and execution (assistance)
15 are used in this rule. Compare with the provision in this
16 rule that the judgment may itself vest title, 6 Tenn. Ann.
Code (Williams 1934), § 10594; 2 Conn. Gen. Stat. (1930),
§ 5455; N.M. Stat. Ann. (Courtright, 1929), § 117-117; 2
Ohio Gen. Code Ann. (Page 1926), § 11590; and England,
Supreme Court of Judicature Act (1925), § 47.

17 Fed. R. Civ. P. 70, Advisory Committee Note 1937 Adoption.

18 ⁵Bankruptcy Rule 7070 provides:

19 Rule 70 F.R.Civ.P. applies in adversary proceedings and
20 the court may enter a judgment divesting the title of any
21 party and vesting title in others whenever the real or
personal property is within the jurisdiction of the court.

22 Fed. R. Bankr. P. 7070.

23 Fed. R. Civ. P. 70: Enforcing a Judgment for a Specific Act

24 (a) Party's Failure to Act: Ordering Another to Act. If
25 a judgment requires a party to convey land, to deliver a
26 deed or other document, or to perform any other specific act
27 and the party fails to comply within the time specified, the
28 court may order the act to be done - at the disobedient
party's expense - by another person appointed by the court.
When done, the act has the some effect as if done by the
party.

(b) Vesting Title. If the real or personal property is

1 Civil Rule 70 carries forward provisions of former Equity
2 Rule 8 adopted by the Supreme Court on November 4, 1912.⁶

3
4 within the district, the court - instead of ordering the
5 conveyance - may enter a judgment divesting any party's
6 title and vesting it in others. That judgment has the effect
7 of a legally executed conveyance.

8 (c) Obtaining a Writ of Attachment or Sequestration. On
9 application by a party entitled to performance of an act,
10 the clerk must issue a writ of attachment or sequestration
11 against the disobedient party's property to compel
12 obedience.

13 (d) Obtaining a Writ of Execution or Assistance. On
14 application by a party who obtains a judgment or order for
15 possession, the clerk must issue a writ of execution or
16 assistance.

17 (e) Holding in Contempt. The court may also hold the
18 disobedient party in contempt.

19 Fed. R. Civ. P. 70.

20 ⁶Former Equity Rule 8 "Enforcement of Final Decrees"
21 provided in relevant part:

22 If the decree be for the performance of any specific act,
23 as, for example, for the execution of a conveyance of land
24 or the delivering up of deeds or other documents, the decree
25 shall, in all cases, prescribe the time within which the act
26 shall be done, of which the defendant shall be bound,
27 without further service, to take notice; and upon affidavit
28 of the plaintiff, filed in the clerk's office, that the same
has not been complied with within the prescribed time, the
clerk shall issue a writ of attachment against the
delinquent party, from which, if attached thereon, he shall
not be discharged, unless upon full compliance with the
decree and the payment of all costs, or upon a special order
of the court, or a judge thereof, upon motion and affidavit,
enlarging the time for the performance thereof. ... If a
mandatory order, injunction, or decree for the specific
performance of any act or contract be not complied with, the
court or a judge, besides, or instead of, proceedings
against the disobedient party for a contempt, or by
sequestration, may by order direct that the act required to
be done be done, so far as practicable, by some other person
appointed by the court or judge, at the cost of the
disobedient party, and the act, when so done, shall have
like effect as if done by him.

Equity Rule 8 (adopted by U.S. Supreme Court, Nov. 4, 1912).

1 Bankruptcy Rule 7070 incorporates Civil Rule 70 and expands
2 its geographic scope from "property within the district" to
3 "property within the jurisdiction of the court." Fed. R. Bankr.
4 P. 7070, incorporating Fed. R. Civ. P. 70.⁷

5 There is two-fold significance of Rule 7070's addition to
6 Rule 70. First, the lien removal power is expanded beyond the
7 boundaries of the judicial district to "all of the property,
8 wherever located, of the debtor as of the commencement of the
9 case, and of property of the estate." 28 U.S.C. § 1334(e)(1).

10 Second, Rule 7070 confirms that Bankruptcy Courts (which are
11 "units" of the District Courts) may implement the lien removal
12 power embodied in Rule 7070.

13 Specifically, implementing Rule 7070 is an exercise of the
14 judicial power to enforce the judgment regarding wholly unsecured
15 deeds of trust incident to the § 1327 confirmation order, which,
16 as noted above, is a final judgment with res judicata effect.

17 Such an exercise of judicial power is a "core proceeding"
18 that a bankruptcy judge may hear and determine on multiple bases.
19 It concerns the allowance and disallowance of claims. 28 U.S.C.

20
21 ⁷The Advisory Committee Note to the 1937 adoption of Rule 70
22 explains:

23 Compare Equity Rules 7 (Process, Mesne and Final), 8
24 (Enforcement of Final Decrees), and 9 (Writ of Assistance).
25 To avoid possible confusion, both old and new denominations
26 for attachment (sequestration) and execution (assistance)
27 are used in this rule. Compare with the provision in this
28 rule that the judgment may itself vest title, 6 Tenn. Ann.
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§ 5455; N.M. Stat. Ann. (Courtright, 1929), § 117-117; 2
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Supreme Court of Judicature Act (1925), § 47.

Fed. R. Civ. P. 70, Advisory Committee Note 1937 Adoption.

1 § 157(b)(2)(B). It involves determination of validity, extent, or
2 priority of liens. Id. § 157(b)(2)(K). It is a determination
3 incident to confirmation of a plan. Id. § 157(b)(2)(L). It
4 affects the adjustment of the debtor-creditor relationship. Id.
5 § 157(b)(2)(O).

6 The specific Bankruptcy Code provision permitting lien
7 removal is the language in § 105(a) that authorizes "any order,
8 process, or judgment that is necessary or appropriate to carry
9 out the provisions of" title 11. 11 U.S.C. § 105(a).

10 Since Federal Rule of Bankruptcy Procedure 7070 is explicit
11 about the power, it follows that a Rule 7070 order must qualify
12 as an example of an order "necessary or appropriate to carry out
13 the provisions" of a Bankruptcy Code § 1327 confirmation order
14 with respect to a wholly unsecured deed of trust.

15 In sum, Congress placed the Rule 7070 tool in the Bankruptcy
16 Court's toolbox. Regardless of state law, the tool is available
17 nationwide to deal with mortgagees who do not timely reconvey
18 deeds of trust that are "void" under federal law.

20 II

21 Chapter 13 Lien Stripping Procedure

22 Upon completion of payments under a confirmed chapter 13
23 plan, a lien that secures an "allowed" claim that is not an
24 "allowed secured claim," (i.e., supported by \$0.00 value) becomes
25 "void." 11 U.S.C. § 506(d). The lien is said colloquially to be
26 "stripped." A plan that provides for such lien stripping will
27 treat the "allowed" claim on the stripped lien as an unsecured
28 claim to be paid pro rata with other allowed unsecured claims.

1 The requisite lien valuation is made before plan
2 confirmation by the court through a contested hearing to
3 determine the value of the property as of the filing of the
4 chapter 13 petition minus the amounts of senior liens. That
5 hearing is the lienor's due process opportunity to be heard on
6 value. If senior liens exceed the value of the property, then
7 junior liens are valued at \$0.00 and treated as wholly unsecured.

8 If a lien on the debtor's principal residence is determined
9 to be wholly unsecured as a result of the valuation, then the
10 chapter 13 plan may provide for voiding or modifying the lien on
11 the basis that it is not "secured." In other words, a mortgage is
12 not a "secured claim" if no value in the property supports it. 11
13 U.S.C. § 1322(b); Zimmer v. PSB Lending Corp. (In re Zimmer), 313
14 F.3d 1220, 1222-27 (9th Cir. 2002); In re Frazier, 448 B.R. 803,
15 810 (Bankr. E.D. Cal. 2011) (Sargis, BJ), aff'd, 469 B.R. 889
16 (E.D. Cal. 2012).

17 The value so determined at the valuation hearing, and the
18 treatment of the claim proposed in the plan, merges into the
19 final chapter 13 plan confirmation order.

20 Confirmation of a chapter 13 plan: (a) binds each creditor;
21 (b) vests all property in debtor unless otherwise provided in
22 plan; (c) such vesting is free and clear of any claim or interest
23 of any creditors provided for by the plan unless otherwise
24 provided in the plan. 11 U.S.C. § 1327.

25 As noted above, plan confirmation is a final judgment with
26 res judicata (claim preclusion and issue preclusion) effect,
27 including valuation issues. Bullard v. Blue Hills Bank, 575 U.S.
28 496, 502 (2015); Espinosa v. United Student Aid Funds, Inc., 559

1 U.S. 260, 270 (2010); Enewally v. Wash. Mut. Bank (In re
2 Enewally), 368 F.3d 1165, 1172-73 (9th Cir. 2004).

3 Upon completion of plan payments under the confirmed plan,
4 liens that have been determined to be wholly unsecured become
5 "void" pursuant to § 506(d).⁸

6 "Void" in § 506(d) means of "no legal effect" or "null." The
7 purpose of § 506(d) "is to nullify a creditor's legal rights in a
8 debtor's property if the creditor's claim is 'not allowed' or
9 disallowed." HSBC Bank USA, Nat'l Ass'n. v. Blendheim (In re
10 Blendheim), 803 F.3d 477, 489 (9th Cir. 2015).

11 Permanent lien-voidance occurs upon completion of chapter 13
12 plan payments, which occurrence is before the case closes and
13 regardless of whether the debtor is eligible for a discharge.

14 The lien on property is in rem in nature. In contrast, the
15 bankruptcy discharge is an in personam matter that eliminates the
16 personal liability of the debtor.

17 A recorded lien on real property that has become "void"
18 needs to be terminated in the land records. Blendheim, 803 F.3d
19 at 492-95; Martin v. CitiFinancial Services, Inc. (In re Martin),
20 491 B.R. 122, 129-30 (Bankr. E.D. Cal. 2013) (Sargis, B.J.).

21 While the debtor may have lingering personal liability on
22 the unsecured note debt until the discharge is entered, the
23 existence of residual personal liability is not a justification
24

25 ⁸It can be argued that § 506(d) is not essential to a "strip
26 off" because the cram down effects of §§ 1327 and 1328(b)(2)
27 suffice. David Gray Carlson, The Housing Bubble and Consumer
28 Bankruptcy (Parts I and II), 97 AM. BANKR. L.J. 396, 425-39
(2023). But, law of the Ninth Circuit treats § 506(d) "voidness"
as important. Blendheim, 803 F.3d at 492-97. It is hard to ignore
a precise provision that applies to all chapters.

1 for delaying reconveyance of a "void" deed of trust. Rather, it
2 is an opportunity for creditor mischief to delay reconveyance as
3 leverage to get payment on discharged debt.

4
5 III

6 Lien Removal Precedent

7 A

8 Federal Law

9 The federal lien removal power is implicit in a consistent
10 line of decisions applicable in this district from the Bankruptcy
11 Court, the District Court, the Bankruptcy Appellate Panel, and
12 the Court of Appeals.

13 The law of the Ninth Circuit authorizing lien stripping was
14 established in Zimmer, 313 F.3d at 1222-27. And, the Ninth
15 Circuit has clarified that the in rem right to avoid a lien is
16 not affected by a debtor's ineligibility for an in personam
17 discharge. Blendheim, 803 F.3d at 489-91.

18 The Bankruptcy Appellate Panel has endorsed the federal lien
19 removal power. Freeman v. Nationstar Mortgage LLC (In re
20 Freeman), 608 B.R. 228, 235 (9th Cir. BAP 2019).

21 The District Court in this district likewise has blessed
22 the federal lien removal power. In re Frazier, 469 B.R. 889 (E.D.
23 Cal. 2012) (England, D.J.).

24 Bankruptcy Judge Sargis of this court has written
25 extensively on the problem. In re Frazier, 448 B.R. 803, 810
26 (Bankr. E.D. Cal. 2012), aff'd, 469 B.R. 889 (E.D. Cal. 2012)
27 (anticipating Blendheim by approving lien stripping without
28 discharge); Martin, 491 B.R. at 126-27, cited with approval,

1 \$0.00 on a California deed of trust. Martin, 491 B.R. at 126-27;
2 cited with approval, Freeman, 608 B.R. at 235.

3 A deed of trust providing real property security for a debt
4 is treated as a mortgage with a power of sale. Bank of Italy
5 Nat'l Trust & Savings Ass'n v. Bentley, 217 Cal. 644, 657 (1933).

6 A California real property lien or security interest cannot
7 exist without an underlying obligation to be secured. Alliance
8 Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1235 (1995).

9 A California lien is deemed "accessory to the act for the
10 performance of which it is a security." Cal. Civ. Code § 2909.
11 Freeman, 608 B.R. at 235; Martin, 491 B.R. at 127.

12 As "accessory" to the debt it secures, a lien or security
13 interest does not have any additional, independent validity once
14 there is no longer an obligation to be secured. 4 WITKIN, SUMMARY OF
15 CALIFORNIA LAW, 10th ed., § 47.

16 The fundamental requirement that a valid, enforceable lien
17 requires an existing indebtedness has been bedrock California law
18 since 1858. Coon v. Shry, 209 Cal. 612, 615 (1930) (citing 5
19 California Supreme Court decisions between 1904 and 1858).

20 Hence, when a California mortgage debt goes to \$0.00, the
21 lien securing that debt is extinguished by operation of law.

22 A consequence of liens being "void" under federal law is
23 that they correlatively are extinguished under California law.

24 25 IV

26 Pleading Federal Lien Removal

27 The Complaints allege the federal lien removal power in two
28 counts: declare value of lien as \$0.00 and extinguish lien.

1 Whether a formal declaration is necessary is doubtful as the
2 predicate determinations have previously been made.

3 The merit of the assertion of the value of the respective
4 liens as \$0.00 is beyond cavil. The controlling property values
5 were fixed by the orders confirming the chapter 13 plans.

6 Chapter 13 plan confirmation orders are final judgments with
7 claim and issue preclusion effect. Bullard, 575 U.S. at 502;
8 Espinosa, 559 U.S. at 270; Enewally, 368 F.3d at 1172-73.

9 The values of the subject junior liens, effective on
10 completion of plan payments, were conclusively fixed as \$0.00 in
11 the plan confirmation orders. The values matured to \$0.00 and
12 became final upon completion of plan payments and the filings of
13 the Chapter 13 Trustee's Notice of Completed Plan Payments.

14 It follows that there is nothing left to declare regarding
15 value in a declaratory judgment.

16 The only remaining step is to clear the cloud on title by
17 removing the lien.

18
19 V

20 Duty to Reconvey Deed of Trust and Enforcement

21 Although the wholly unsecured liens are "void" under federal
22 law upon completion of chapter 13 plan payments because \$0.00 is
23 owing and are extinguished under California law, the recorded
24 Deeds of Trust that are accessory to the debt under California
25 law remain of record and continue to function as a cloud on
26 title. The cloud dissipates only upon reconveyance or removal of
27 the deeds of trust from the record.

28 The cloud on title is not harmless. It stymies the debtor's

1 ability to engage in transactions, such as refinancing or selling
2 the real property.

3 The lender, by virtue of the contractual terms of the deeds
4 of trust, has a contractual duty to request that the trustee
5 reconvey upon payment of all sums secured by the deeds of trust.⁹
6 Payment means when the debt is \$0.00.

7 Completion of chapter 13 plan payments on a plan in which
8 the subject debt has been valued by the court at \$0.00 satisfies
9 the performance contingency inherent in the plan. At that point,
10 the debt, beyond cavil, is \$0.00. It follows that all sums
11 secured by the affected deeds of trust have been paid.

12
13 A

14 The lender thereupon has a federal duty to request that the
15 trustee reconvey the deed of trust on the void debt.

16 If voluntary reconveyance does not timely occur following
17 completion of chapter 13 plan payments, then the debtor is
18 entitled to invoke the federal lien removal power in an adversary
19 proceeding seeking involuntary reconveyance.

20
21 B

22 Coincidentally, California imposes a statutory duty to
23 reconvey at Civil Code § 2941, on pain of actual damages and
24 statutory damages of \$500.00.

25 _____
26 ⁹Both deeds of trust in these cases state:

27 Reconveyance: Upon payment of all sums secured ...
28 Lender shall request Trustee to reconvey the property ...
Buettner-Elkins Deed of Trust ¶ 20; Krone Deed of Trust ¶ 22.

1

Civil Code § 2941

The mortgagee or assignee of the mortgage (i.e., PHH) within 30 days after any mortgage has been satisfied must execute a certificate of the discharge thereof and to record it or cause it to be recorded in the office of the county recorder in which the mortgage is recorded. Cal. Civ. Code § 2941(a).

The beneficiary or assignee of the beneficiary must also execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey or cause to be reconveyed, the deed of trust. Cal. Civ. Code § 2941(b)(1).

2

As Judge Sargis has explained, § 2941(b)(1) imposes an affirmative obligation on the beneficiary of the deed of trust to instruct the trustee under the deed of trust to issue a full reconveyance when the underlying obligation has been satisfied. Luchini, 511 B.R. at 672; Martin, 491 B.R. at 130.

If the statutory duty is not satisfied within the time specified by § 2941, then the debtor is entitled to actual damages and \$500.00 statutory damages. Cal. Civ. Code § 2941(d).

3

PHH's 30 days under § 2941 commenced upon satisfaction of the mortgages by completion of chapter 13 plan payments. The logical measuring date for the mortgages being "satisfied" within the meaning of § 2941 is the date of entry on the court's docket

1 of the Chapter 13 Trustee's Notices of Completed Plan Payments.¹⁰

2 PHH was derelict in its § 2941 duties to Krone as of October
3 11, 2020, but he did not sue PHH until June 2, 2022. Full
4 reconveyance was recorded August 22, 2022

5 PHH was derelict in its § 2941 duties to Buettner and Elkins
6 as of October 24, 2021, but they did not sue until March 4, 2022.
7 Full reconveyance was recorded March 23, 2022.

8 PHH concedes a § 2941 violation and that the plaintiffs are
9 each entitled to \$500.00 in statutory damages. PHH contends that
10 the Plaintiffs have identified no actual damages and contends
11 that attorney's fees are not available for § 2941 violations.¹¹
12

13 VI

14 Attorneys' Fees

15 The main bone of contention in this summary judgment motion
16 is whether attorneys' fees may be awarded for plaintiffs' efforts
17 to get PHH to perform its duty to reconvey.
18

19 A

20 Federal Lien Removal Attorneys' Fees

21 Federal lien removal decisions hold that contractual
22

23 ¹⁰For Krone, the 30 days commenced September 11, 2020. For
24 Buettner and Elkins, the 30 days commenced September 24, 2021.

25 ¹¹PHH attacks the breach of contract count as not pled in
26 sufficient detail. Such a defect might eventually warrant
27 dismissal, but not until after an opportunity for a more definite
28 statement. PHH's contention that it had no duty to reconvey upon
completion of chapter 13 plan payments because Krone was earlier
in default lacks substantial merit as a defense to the federal
lien removal power - but it does evince a antediluvian corporate
mindset that might explain PHH's 710 days of sloth.

attorneys' fee clauses in deeds of trust apply to the federal lien removal power. Blendheim, 803 F.3d at 501-02; Luchini, 511 B.R. at 678-81; Martin, 491 B.R. at 130.

1

Deed of Trust Contract Provisions

Here, the respective deeds of trust provide for reasonable attorneys' fees and costs.¹² Likewise, the promissory notes contain attorneys' fees provisions.¹³

2

California Civil Code § 1717

California prohibits non-reciprocal attorneys' fee clauses in contracts in a manner that makes an otherwise unilateral right to attorneys' fees reciprocally binding upon all parties in actions to enforce the contract. Cal. Civ. Code § 1717(a).¹⁴

The Ninth Circuit holds that Civil Code § 1717 reflects a

¹²Krone Deed of Trust ¶¶ 8, 18, & 21; Buettner-Elkins Deed of Trust ¶¶ 7, 17, & 18.

¹³Krone "Note(Secondary Lien)" ¶ 6; Buettner-Elkins "Note and Security Agreement" ¶ 10.

¹⁴Civil Code § 1717(a) provides:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ. Code § 1717(a).

1 "fundamental policy" of the state of California for choice of law
2 purposes that overcomes contrary provisions in contracts choosing
3 the law of another jurisdiction. First Intercontinental Bank v.
4 Ahn, 798 F.3d 1149, 1156-58 (9th Cir. 2015).

5 The adversary proceedings to enforce the § 506(d) judicial
6 determinations that the deeds of trust are "void" qualify as
7 "actions on a contract" for purposes of Civil Code § 1717.

8 PHH had not reconveyed the Buettner and Elkins deed of trust
9 in the in 159 days following the filing of the Notice of
10 Completed Plan Payments in their case when they filed their
11 adversary proceeding March 4, 2022. The subsequent reconveyance
12 by PHH makes Buettner and Elkins "prevailing parties" for
13 purposes of Civil Code § 1717.

14 PHH had not reconveyed in the 649 days following the filing
15 of the Notice of Completed Plan Payments in Krone's case when he
16 filed his adversary proceeding June 22, 2022. The subsequent
17 reconveyance by PHH makes Krone "prevailing party" for purposes
18 of Civil Code § 1717.

19
20 3

21 Federal Lien Removal Attorneys' Fee Awards

22 Federal lien removal actions by chapter 13 debtors have been
23 held to qualify for prevailing party attorneys' fees under Civil
24 Code § 1717. Blendheim, 803 F.3d at 501-02; Luchini, 511 B.R. at
25 678-81; Martin, 491 B.R. at 130.

26 In Martin, the court ruled fees were available under Civil
27 Code 1717 and required a motion for fees, the outcome of which is
28 not in the reported decision. Martin, 491 B.R. at 131-32.

1 Of particular note for PHH and its ilk is the prescient
2 observation in Martin that attorneys' fees for such actions could
3 be expensive for the creditor.¹⁵

4 In Blendheim, on remand from the Ninth Circuit to consider
5 fees and costs, the bankruptcy court applied Washington's
6 reciprocal fee statute, RCW § 4.84.330, which was modeled on
7 California Civil Code § 1717. It awarded "\$139,171.83 in
8 attorneys' fees and costs thus far," with additional amounts
9 available for post-remand activity. In re Blendheim, 2016 WL
10 4264058 at *6 & *13 (Bankr. W.D. Wash. 2016)

11 In Luchini, the fee award was \$4,774.75 and costs of \$113.00
12 under Civil Code § 1717.

13
14 B

15 Civil Code § 2941 Attorneys' Fees

16 PHH contends that Civil Code § 2941 affords it safe harbor
17

18 ¹⁵Judge Sargis' observation merits repetition:

19 A consumer debtor and the court do not serve as a "for free
20 title department" processing reconveyances for a creditor.
21 Prevailing plaintiffs may seek recovery of their attorneys'
22 fees and expenses, as this plaintiff has, for the reasonable
23 attorneys' fees and costs to clear a cloud on title
24 following completion of a confirmed chapter 13 plan. Such
25 litigation requires an experienced, sophisticated attorney
26 who understands the interplay between state real property
27 law and federal bankruptcy law to effectively prosecute an
28 action to enforce the Plaintiff's rights obtained through
completion of the chapter 13 plan. Such attorneys' fees are
not inexpensive, as Plaintiff must go through multiple steps
in not only filing and properly serving the Complaint, and
having the default entered, but prosecuting a motion
providing the court with the sufficient legal and
evidentiary basis for entry of a judgment in the litigation.

Martin, 491 B.R. at 132 n.18.

1 from attorneys' fee awards.

2 It reasons from the absence of a specific attorneys' fee
3 provision in § 2941 and decisions that the section does not
4 create a statutory right to fees. E.g. Luchini, 511 B.R. at 677.
5 True enough, but fallacious.

6 The fallacy inherent in its argument is the omission to note
7 that § 2941 neither negates § 1717 nor renders inapplicable basic
8 contractual rights to fees. Luchini, 511 B.R. at 679-80.¹⁶

9 In short, contractual attorneys' fee provisions in the
10 underlying contracts and deeds of trust remain enforceable.

11 An action premised on § 2941 is an "action on a contract"
12 for which the "prevailing party" is entitled to avail itself of
13 contractual fee rights. Luchini, 511 B.R. at 679-80.

14
15 VII

16 Mootness

17 PHH contends that its belated voluntary reconveyances render
18 the adversary proceeding moot. Not so.

19 While the voluntary reconveyances that were made after the
20 adversary proceedings were filed obviated the need for this court
21 to force that result involuntarily by exercising its muscle under
22 its judgment enforcement power, that does not end the story with
23 respect to the federal cause of action.

24 In principle, under Rule 70(e) PHH as disobedient party is
25

26 ¹⁶It is disappointing that PHH's counsel relied on the
27 portion of Luchini rejecting the proposition that § 2941 did not
28 create a statutory right to fees but then omitted to note that
the Luchini court proceeded to award fees based on contract.
Compare, Luchini, 511 B.R. at 677, with id. at 679-80.

1 exposed to the possibility of contempt. Fed. R. Civ. P. 70(e).

2 Moreover, belated reconveyances do not moot the prevailing
3 party attorneys' fees issues for the Plaintiffs.

4
5 VIII

6 Summary Judgment

7 PHH made this motion for summary judgment. It is not a
8 motion for partial summary judgment. Rather, it places in
9 question the entire Complaint.

10 PHH contends there is no such thing as a federal lien
11 removal cause of action and that attorneys fees are not available
12 to Plaintiffs. There are no genuine issues of material fact
13 regarding those issues. Those contentions are wrong on the
14 merits. Plaintiffs are entitled to judgment as a matter of law.

15 PHH's contentions regarding California Civil Code § 2941 are
16 dubious and are contradicted by federal decisions cited in this
17 opinion. But, in light of this court's conclusions about federal
18 lien removal power and the availability of attorneys' fees, are
19 not essential to the outcome.

20 Mindful that caution is required when awarding relief to a
21 non-moving party, it nevertheless is permissible to grant summary
22 judgment for a non-moving party if the issues were presented in
23 the original motion and the moving party had a full and fair
24 opportunity to ventilate the issues. Gonzales v. CarMax Auto
25 Superstores LLC, 840 F.3d 644, 654-55 (9th Cir. 2016); Gospel
26 Missions of America v. City of Los Angeles, 328 F.3d 548, 553
27 (9th Cir. 2003).

28 Here PHH had a full and fair opportunity to ventilate the

1 issues. It is incorrect, as a matter of law on both counts.

2 Accordingly, summary judgment will be granted in favor of
3 the non-moving Plaintiffs.

4
5 Conclusion

6 The Plaintiffs brought meritorious actions to enforce the
7 federal judgments establishing that the respective liens became
8 "void" upon completion of payments under their chapter 13 plans.
9 Defendant PHH did not timely perform its duty under federal and
10 under state law to reconvey the respective deeds of trust that
11 remained as clouds on title. The reconveyances made after these
12 actions were filed make the Plaintiffs prevailing parties on
13 "actions on the contracts" for purposes of California Civil Code
14 § 1717. The Plaintiffs are entitled to attorneys' fees and costs
15 pursuant to the fee provisions in the respective deeds of trust.

16 Judgments consistent with this opinion will be entered in
17 separate documents.

18 SO ORDERED

19
20 DATE:



Christopher M. Klein

United States Bankruptcy Judge